No. 7562

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

METROPOLITAN LIFE INSURANCE COMPANY (a corporation),

Appellant,

vs.

AMOS HALCOMB, as Administrator of the Estate of George R. Halcomb, also known as George Raymond Halcomb, Deceased,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellee respectfully petitions for a rehearing and thereupon shows:

The attention of the Court is directed to the Air Commerce Act. This act does not prohibit the making of a contract of carriage, nor is the act of operating an aeroplane contrary to the provisions made a crime. The only penalty is "a civil penalty of $500 which may

be remitted or mitigated by the Secretary of Commerce, the Secretary of the Treasury or the Secretary of Labor, respectively, in accordance with such proceedings as the Secretary shall by regulation prescribe".

United States Code Annotated (Sup. 1933) Section 181.

We repeat that there is nothing in the statute invalidating any contract of carriage or forbidding the making of a contract of carriage by a pilot or making the act of a passenger in riding with an unlicensed pilot unlawful.

The jury under proper instructions of the Court found that a contract of carriage had been made. As between the parties, this is a binding contract, and the only question is, will the Court refuse to enforce the contract because of the absence of a license on the theory that Courts in certain cases will decline to enforce illegal contracts?

We respectfully submit that this contract is within the exception stated in *Dunlop v. Mercer,* 156 Cal. 545, cited on page 10 of appellee's brief. The exception is that where a contract is not evil in itself, and its invalidity is not denounced as a penalty by the express terms of or by rational implication from the language of the statute which it violates, and that statute prescribes other specific penalties, it is not the province of the Courts to do so, and they will not thus affix an additional penalty not directed by the law-making power.

This same distinction is recognized in the case of *Ewell v. Daggs,* 108 U. S. 143 (150), 2 Sup. Ct. 408, 27 L. Ed. 682.

There is also another equally well settled rule and that is that if the purpose of the statute can be accomplished without declaring contracts in violation thereof illegal, the inference is that it was not the intention of the law makers to render such contracts illegal and unenforceable.

So, appellee respectfully suggests that under these authorities, when a plea of illegality is set up, the Court must examine the entire statute to discover whether or not the Legislature intended to prevent Courts of justice from enforcing contracts based on the act prohibited.

There is nothing in this statute indicating that it was the legislative intent that any penalty should be attached to the violation of the contract other than that specifically imposed by the statute. This rule is particularly applicable to this statute because it only inflicts a civil penalty. The act is not made criminal and there is no provision of the statute providing that a contract made in violation thereof is void.

We also emphasize the proposition that the statute imposes no penalty upon the passenger.

As stated by the United States Supreme Court in *Yates v. Jones National Bank,* 51 L. Ed. 1012; 206 U. S. 158, "Where a statute creates a duty and prescribes a penalty for nonperformance, the rule prescribed by the statute is the exclusive test of liability".

This statute permits the doing of the act by paying the penalty which is a species of license money exacted for the privilege of doing the act, and no other act is made unlawful by the statute.

6 *Ruling Case Law* 704.

We call attention to the quotation from *Story on Contracts* on page 21 of appellee's brief declaring the rule that

> "If the contract be executed however, that is, if the wrong be already done, the illegality of the consideration does not confer on the party guilty of the wrong the right to renounce the contract, for the general rule is, that no man can take advantage of his own wrong, and the innocent party, therefore, is alone entitled to such a privilege".

Here, the jury has found that a contract was made by the assent of the parties.

We respectfully suggest that the distinction between contracts implied in fact and contracts implied by law is very marked and well defined.

The right of recovery herein does not depend upon the Court implying a contract as a matter of law. The existence of the contract was determined by the verdict of the jury.

> "A distinction exists between contracts implied in fact and those which are implied in law. The former are implied contracts, and the latter are quasi contracts. In a quasi contract the contract is a mere fiction; the intention being disregarded. In an implied contract the intention is ascertained and enforced. 'In one, the intention is disregarded; in the other it is ascertained and en-

forced'. *Hertzog v. Hertzog,* 29 Pa. 465, 468. A quasi contractual obligation is imposed by law for the purpose of bringing about justice, without regard to the intention of the parties.

In quasi contract there is no contract obligation in the true sense, for there is no agreement; but it is clothed with the semblance of contract for the purpose of the remedy. *Nevada Co. v. Farnsworth* (C. C.) 89 F. 164; See *People v. Dummer,* 274 Ill. 637, 641, 113 N. E. 934; *Mathie v. Hancock,* 78 Vt. 414, 417, 63 A. 143. In 40 Cyc. 2807, the law is stated as follows:

'But where an obligation is imposed by law upon one to do an act and he fails to perform it, because of the interest of the public in its performance, one who does perform it, with the expectation of receiving compensation is entitled to recover.'

In Williston on Contracts, Vol. 1, Sec. 3, that writer says:

'* * * All rights enforced by the contractual actions of assumpsit, covenant and debt were regarded as based on contracts. Some of these rights, however, were created, not by any promise or mutual assent of the parties, but were imposed by law on the defendant irrespective of, and sometimes in violation of his intention. Such obligations were called implied contracts. A better name is that now generally in use of quasi contracts. This name is better since it makes clear that the obligations in question are not true contracts, and also because it avoids confusion with another class of obligations, which have also been called implied contracts. This latter class consists of obligations arising from mutual agreement and

intent to promise, but where the agreement and promise have not been expressed in words. Such transactions are true contracts, and have sometimes been called contracts implied in fact.'

In 13 C. J. 244, it is said:

'Contracts implied in law, or more properly quasi or constructive contracts, are a class of obligations which are imposed or created by law without regard to the assent of the party bound, on the ground that they are dictated by reason and justice, and which are allowed to be enforced by an action ex contractu.'

City of New York v. Davis, 7 Fed. (2d) 566.

'A contract implied in fact is a true contract, the agreement of the parties being inferred from the circumstances, while a contract implied in law is but a duty imposed by law and treated as a contract for the purposes of a remedy only.' ''

13 *Corpus Juris* 240.

The only distinction between a contract implied in fact and an express contract rests in the mode of proof. The nature of the understanding is the same and both express contracts and contracts implied in fact are founded on the mutual agreement of the parties.

13 *Corpus Juris* 242.

The right of the appellee to a recovery does not depend upon the Court implying a contract as a matter of law. The contract is established by the proof and the verdict of the jury. The only question is, will the Court decline to recognize this contract because it was made in violation of the Air Commerce Act?

As argued in our brief and suggested herein, the true rule is that the question is one of legislative intent, and the Courts will look to the language of the statute, the subject matter of it, the wrong or evil which it seeks to remedy or prevent, and the purposes sought to be accomplished in its enactment. If from all these it is manifest that the statute was not intended to imply a prohibition or render the prohibited act void, the Court will so hold and construe the statute accordingly.

This rule is stated in *Harris v. Runnels* cited in the opinion.

> "It is familiar law that not every contract in contravention of the terms of a statute is void, and the Courts will search the language of the statute to see whether the intent of the makers that a contract in contravention of it should be void or not."
>
> *Burck v. Taylor,* 152 U. S. 634; 38 L. Ed. 578.

What facts will create relation of carrier and passenger is a question of law. The existence or nonexistence of such facts in each particular case is where there is a conflict of evidence on the point. The finding of the jury is conclusive.

4 *Ruling Case Law* 1028 and 1029.

Assuming that the owner of the plane could not recover under the rule stated in the cases cited in the opinion, still that is an entirely different question from the right of the passenger to recover on this contract of insurance. Here was an express contract binding the company to pay the loss provided the deceased was a fare paying passenger. The jury has found that there

was a contract of carriage and that he was a fare paying passenger.

The only objection to a recovery is that the pilot of the ship was not licensed. Even granting that the pilot could not have recovered under the rule stated, still this contract of carriage between Halcomb and the pilot was a contract resting upon their assent and is not a contract which the Court is called upon to imply as a matter of law.

We repeat that the sole question before the Court is, will the Court refuse recognition of this contract under the rule of public policy? On this issue, we think the law is clear that because Halcomb was not *in pari delicto* the statute does not denounce the contract as void, and there is nothing in the statute supporting the proposition that the Legislature intended to prohibit the making of such contracts.

The effect of this decision is very far reaching. Suppose a passenger purchased a ticket from a railroad company in violation of some rule of the Interstate Commerce Commission or some Federal statute governing the carrier. Under this rule, such passenger would be deprived of his right to recover for any injuries sustained by reason of the negligence of the carrier.

In other words, the rule announced in the opinion is a very broad and comprehensive one, and viewed in the light of the statute in force will prevent a recovery of contracts made by persons wholly innocent and without any knowledge that any regulation or law has been violated by the party with whom they are con-

tracting. In other words, every person becoming a passenger on an aeroplane, as well as on all other carriers where licenses or regulations are enforced is at the peril of determining whether a license has been issued and all Federal regulations observed.

> "To the general principle that ignorance of the law is no excuse for making a contract violating that law, there are some exceptions. The rule does not apply where the performance of the agreement in the manner intended would, unknown to parties, be illegal, but a legal method of performance is possible. Nor does the rule apply where the mistake is really one of fact and not of law. Where a person sues for services rendered another in an occupation which is illegal, unless the employer is duly licensed to carry it on, which he is not, such person may recover unless he knew that the employer had had no license, for while he is bound to know that the employer must have a license to make the business legal, his mistake as to his having such license is a mistake of fact and not of law. So it is held that a bond given to a person to indemnify him against liability for seizing goods under a writ or for arresting a person, is illegal if the person to whom it is given knew the seizure or arrest to be without right, but legal if he believed it to be authorized. An agreement is not necessarily illegal because carried out in an illegal way, if this was not contemplated when the agreement was made. Where the contract is illegal for other reasons than that it involves moral turpitude, ignorance of the illegality of the contract on the part of the party seeking relief has been considered as strong ground for granting relief to him".
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> 13 *Corpus Juris* 516.

Appellee therefore respectfully submits that a rehearing should be granted and the judgment should be affirmed.

Dated, Woodland, California,
November 29, 1935.

Respectfully submitted,
L. C. SMITH,
HUSTON, HUSTON & HUSTON,
Attorneys for Appellee and Petitioner.

CERTIFICATE OF COUNSEL.

The undersigned counsel for appellee herein do hereby certify that in their judgment, the said petition is well founded and that it is not interposed for delay.

Dated, Woodland, California,
November 29, 1935.

L. C. SMITH,
HUSTON, HUSTON & HUSTON,
Attorneys for Appellee and Petitioner.